No. 1585

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WONG SEE YING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Opening Brief on Behalf of Appellant in Error.

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IN THE

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Appellant,
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STATEMENT OF THE CASE.

This is an appeal from an order of the District Court of the United States, in and for the Northern District of California, discharging a writ of *habeas corpus* and remanding this appellant to the custody of the Commissioner of Immigration at the port of San Francisco, who is holding him in restraint with the intention of sending him out of the country, against his will and without his consent.

The appellant is *a Chinese person,* who, upon arriving at the port of San Francisco, applied to the immigration authorities of the United States for admission thereto, alleging as a reason that he was a native-born citizen and entitled to enter as a matter of right. He

was given the customary examination before the Chinese Bureau in charge of Hon. Hart H. North, Commissioner of Immigration at the port of San Francisco. This examination or hearing formally complied with the rules of the Department of Commerce and Labor and was briefly as follows: This appellant was given the opportunity of naming his witnesses and did so as far as he was able; he was also represented by counsel as far as the rules of the department allow such representation, and as far as self-respecting counsel may take advantage of such rules (Tr. of Rec., pp. 104, 105, 106, 107). His examination was separate and apart from that of his witnesses and their examination was separate and apart from him before an Inspector of Immigration, who reported an abstract of the testimony taken and his views and conclusions drawn therefrom to the Inspector of Immigration in charge, with a recommendation that the application be denied, who in turn reported it to the Commissioner with a like recommendation.

The Commissioner, although he denied the application, was dissatisfied with the report and sharply reprimanded the Inspector who conducted the examination (Tr. of Rec., pp. 91-92). We expect to convince the Court that, though soundly administered, the reprimand did not even touch upon the gravest errors of the report and recommendation.

Upon the final denial of his application by the Commissioner the appellant appealed to the Secretary of

Commerce and Labor, who dismissed the appeal upon the recommendation of the Commissioner-General of Immigration, who summed the case up.

While in this case we admit that the proceedings were *formally* in accordance with the rules of the Department, we believe that a fair hearing in good faith such as the law contemplates was denied the applicant.

Chin Yow vs. *U. S.,* 208 U. S., p. 8.

We believe that the law was grossly violated in letter and spirit in almost every step and that the evidence of such violation is apparent in every word and line of the record.

With this opinion strongly settled appellant petitioned the District Court for the writ of *habeas corpus,* alleging in substance that he was a citizen of the United States and had been denied a fair hearing in good faith (Tr. of Rec., pp. 7, 8 and 9), which allegations were made stronger in his traverse to the return (Tr. of Rec., p. 108, end of paragraph VI, and p. 110, end of paragraph VII).

We rest on the assumption that the petition for the writ and the two portions of the traverse to the return bring us directly and squarely within the rule laid down in *Chin Yow* vs. *U. S., supra.*

Here we believe an explanation is due. We would have pleaded the matter more directly in the petition had the text of *Chin Yow* vs. *U. S.* been before us, but at the time the petition was filed we had *telegraphic*

news only that the Supreme Court had rendered its opinion in that case. The many errors of omission (and some of commission) in the traverse are due to the fact that a hastily prepared copy, the only available one, was used in place of the original that was mislaid and disappeared almost as soon as it was filed (see Tr. of Rec., p. 111, stipulation signed George Clark).

The writ of *habeas corpus* was duly issued and a return and a traverse to the return were filed.

Upon the hearing of the matter two witnesses were sworn and testified, and the whole of the record of the proceedings and appeal before the immigration authorities was introduced and admitted in evidence. We also offered seven witnesses whom we named for the purpose of proving that this appellant was a native-born citizen of the United States. An objection was made to this offer and was sustained by the Court, whereupon an exception was noted (Tr. of Rec., pp. 39 and 40). This ruling of the Court we assigned as error (Tr. of Rec., pp. 98 and 99). The Government introduced two witnesses and the matter was submitted.

In a written opinion wherein the reasons for so doing were fully set forth, the Court discharged the writ of *habeas corpus* and remanded Wong See Ying, this appellant, to the custody from whence he was taken and it was so ordered (Tr. of Rec., p. 96). From this order we appealed to this Honorable Court and assigned certain errors, which are in the assignment of errors fully set forth (Tr. of Rec., pp. 98-99).

APPELLANT'S THEORY OF THE CASE.

That portion of the immigration service of the United States that deals exclusively with Chinese persons has accomplished a stupendous task. The horde of Chinese who a quarter of a century ago bid fair to outnumber the whites in the State of California has practically disappeared, and but a few thousand of them now remain and those few are scattered throughout the whole country. With this great labor we have no fault to find but congratulate them on a duty well and fairly done. In the many thousand cases upon which they have passed, in the vast majority substantial justice has been meted out. Their never-ceasing diligence against an encroaching race of alien immigrants whose civilization was hostile to ours has brought about a solution of a problem of the most serious character, but has led to an enforcement of the laws and of the rules of the Department of Commerce and Labor with an unfairness that can not be tolerated when used against a person who claims to be a citizen of the United States.

Chin Yow vs. *U. S.*, 208 U. S., p. 8.

It is due to the overzealous efforts of these immigration officers that Wong See Ying, the appellant in the case at bar, is in the unhappy situation that he now finds himself. In this case the methods of these officials have worked a great and grievous injustice to a citizen of the United States.

The first question to be presented to this Court for its consideration should be: What is the fairness and good faith that is guaranteed by the law to applicants for admission to this country in cases like the one now under consideration? The Supreme Court, by its opinion in the Chin Yow case cited above, has settled forever any doubts as to the applicant's right to such a hearing.

The term is usually used in other branches of the law, especially in the law of contracts and is so generally understood that it requires little or no explanation or argument. "Good" and "faith" are two of the best words in the language, and to collect together the various shades of meaning given to them would require the editing of a thesaurus. It is somewhat difficult to apply the principles of the law of contracts to a case like the one under consideration. Hundreds of cases might be cited which defined the term, but nearly all of them relate to and savor of contracts.

The following definition, which has found its way into the statute law of some of the States and into the decisions of the courts of others, seems to fit this case and we submit that the term needs no better or wiser definition, and that the Supreme Court, in its opinion in the Chin Yow case, meant good faith of this order.

> "Good faith consists in an honest intention to abstain from taking any unconscious advantage of another, even through the forms and technicalities of law, together with an absence of all information or

belief which would render the transaction unconscientious."

Black's Law Dict., p. 543;
Bouvier's Law Dict. (Rawles' Revis. Vol. 1), p. 887;
Rev. Stats. Okl., 1903, Sec. 2787;
Rev. Codes N. D., 1899, Sec. 5114;
Civ. Code, S. D., 1903, Sec. 2448;
Cone vs. *Ivinson,* 4 Wyo., p. 203;
Renoudet Co. vs. *Shadel,* 52 La. Ann., 2094; 28 South., pp. 292-294;
Friedrich vs. *Fergen,* 91 N. W., pp. 328-330;
Gress vs. *Evans,* 46 N. W., pp. 1132-1134.

Applying the above definition, it is not presumptious to expect that the administrative officers should have given the applicant a fair start, by laying aside all prejudice against a class among which he is unfortunate enough to be numbered; a class unlawfully and arbitrarily discriminated against in the matter of the degree of credence to be given to their testimony, which classification is neither authorized by law nor consistent with ordinary justice. Neither is it presumptious to assume that this fairness and good faith should remain with him through every step of the proceedings, including his appeal and until the final determination of his case, everything in the record in his favor inuring to his benefit, and nothing being used against him that is not in the record.

While we can not believe that it was ever intended by the law that a set of rules so manifestly unjust should ever apply to a citizen, we are prevented from urging that phase of this case by the opinion of the Supreme Court in

U. S. vs. *Ju Toy,* 198 U. S., p. 253,

although we are convinced that before actual justice will ever be accorded to a citizen of the Chinese race law or laws will have to be framed enlarging the privileges and immunities of citizens generally. We are forced to this conclusion by reading the dissenting opinion of Mr. Justice Brewer in the Ju Toy case, above cited, and by realizing that when authorities so eminent differ so widely there will be dissatisfaction until the legislative arm of the government takes some action that will settle the question. One class of native-born citizens, however small it may be, holding certain truths to be self-evident, can never feel secure while they are subjected to a set of rules that sometimes entail the most humiliating treatment, together with long periods of imprisonment, when all other citizens, whether native-born or otherwise, are free and unhampered by them. But as these rules do exist and are recognized by the courts to be in full force, this appellant is confronted, not by a theory, but by a condition with which he must deal. Therefore, we urge upon this Honorable Court that it consider this case as though the citieznship of the appellant had been

proved. It is not his fault that he comes here with that question unsettled. The proof was offered in the District Court but was refused. We also urge, that however strict and seemingly harsh the rules of the Department of Commerce and Labor may be, their spirit, like the spirit of all law, must be eventual and exact justice and that they must be followed, not only in form, but with the same fairness and good faith that would be exercised by a regularly constituted court, presided over by a learned and a just judge.

THE LAW OF THE CASE.

Stripping the question before the Court of all irrelevant and unnecessary argument and going directly to the heart of this case, we assert and submit that there is but one case in point.

Chin Yow vs. *U. S.,* 208 U. S., p. 8, *supra.*

As we challenge neither the statute, nor the rules dictated by the Department of Commerce and Labor to facilitate its enforcement, and as we do not urge that this appellant is not subject to the jurisdiction of the officers of that department, if the same is fairly exercised not even the case of

U. S. vs. *Ju Toy,* 198 U. S., 253, *supra,*

applies because in that case those rules were directly challenged on a petition which alleged only that the

applicant was a citizen of the United States. The question of good faith or fairness was not an element in that case at all, while in the case at bar, where we claim simply and directly that the law and rules have been openly violated, and that the record bristles with evidences of such violation, it is the crux.

In connection with a portion of this case affecting one alleged error of the District Court, which error is the second assigned in the assignment of errors (Tr. of Rec., p. 99), we submit that a large part of the opinion in the Chin Yow case, *supra,* is *obiter dictum.* That case squarely holds that upon a petition by a person who alleges that he is a citizen of the United States and has not had the hearing before the administrative officers that the law contemplates he should have, a writ of *habeas corpus* should issue and a judicial review allowed upon the questions presented.

Upon that portion of the Chin Yow decision we rest our main case.

Upon the hearing on the return to the writ of *habeas corpus* in the District Court, the appellant offered seven witnesses to prove that he was a citizen of the United States. This offer was objected to by counsel for the Government, the objection was sustained by the Court and an exception taken and noted for appellant (Tr. of Rec., pp. 39, 40, 41). Appellant assigned the refusal of the Court to hear the testimony of these seven witnesses as error (Tr. of Rec., p. 99).

While this refusal is apparently justified by some portions of the Chin Yow case we claim, and it is not without hesitancy that we do so, that those portions of that decision which seem, by way of caution, to limit the *nisi prius* court as to how it shall proceed in a matter before it, is *obiter dictum.* As such it should not have been considered by the *nisi prius* court, and should not be considered by this Court, and especially is this so in the case at bar, where a following of that ruling converts the most simple of all inquiries, that of a return upon a writ of *habeas corpus,* into a most complicated and ponderous proceeding.

Chin Yow, in the District Court upon a certain petition, had been denied a writ of *habeas corpus,* and the only thing before the Supreme Court, when the case came to it upon an appeal from that order, was whether or not the writ under the circumstances should issue. Manifestly, on that appeal, there could have been nothing else for the Court to consider.

Thus, the Supreme Court in that case determines a question of law that was not before it and that had not been presented or argued by counsel and set as a precedent, to be followed by *nisi prius* courts in *habeas corpus* proceedings, a rule that not only works a hardship upon an applicant for *habeas corpus,* but also works a hardship upon the Court in that it imposes upon it a multitude of proceedings where one proceeding would suffice. Under that rule it must first be determined whether the hearing before the immigration

officers had been fair and in good faith or not. That, as the Court will see from the record presented in this case, is a question that can not readily be determined without the record being taken under advisement.

Then, if the Court determined that the hearing had been fair, it would be necessary to hold another session of court to inquire into the citizenship of the applicant, but if the Court reached the contrary conclusion and discharged the writ of *habeas corpus,* and, as in this case, the applicant should appeal, only *half* of his case could be taken to the appellate court. Thus, two appeals would be required in the same case. It is possible and even *probable* that such a case might twice come before the Supreme Court on *certiorari,* in which event many years would elapse before its final determination. Such a condition is unjust in the extreme, and one that may be readily and simply avoided.

Unless this Court is convinced by the testimony of his witnesses that appellant is in fact a citizen of the United States, after it has first been convinced and determines that his hearing before the bureau was unfair and not given in good faith, are we not confronted not only by a possible but by an actual situation like the one above depicted?

It will be readily understood that few citizens would care to contemplate, much less to undertake so arduous a labor, and practically no native who had departed from this country in his youth, as did this appellant, unless he belonged to the privileged classes, could maintain the great cost of such a double appeal.

Bail has not as yet been allowed in this case and *may* never be.

Then truly may it be said that this citizen is in a sorry plight. Expatriation or years of imprisonment stare him in the face. Even were he allowed his liberty on security, he may be compelled to fight a long and bitter battle extending over years at a cost almost, if not quite, impossible for a poor man to meet.

It seems certain that the Supreme Court of the United States never intended by a mere *obiter dictum* to place a person seeking justice in such a hopeless position.

The law of *obiter dictum* has been clearly defined and rigidly adhered to by the courts of the United States. The Supreme Court has always held without qualification that dicta should not control in a subsequent suit, and that observations unnecessary to a decision ought not to outweigh important considerations leading to different conclusions.

United States vs. *Moore,* 3 Cranch., p. 172;
Cohens vs. *Virginia,* 6 Wheaton, 399-402;
Ex parte Christy, 3 How., 322;
Wisconsin R. R. vs. *Price,* 133 U. S., 509;
Jenners vs. *Peck,* 7 How., p. 612;
Cross vs. *Burke,* 146 U. S., 87;
In re Woodruff, 96 Fed., pp. 317-322;
Alferitz vs. *Borgwardt,* 126 Cal., pp. 201-209;
Hans vs. *Louisiana,* 134 U. S., 20.

In *Hans* vs. *Louisiana, supra,* Mr. Justice Bradley, in commenting on some of the language of Chief Justice Marshall, in *Cohens* vs. *Virginia* (*supra*), says:

> "It must be conceded that the last observation of the Chief Justice does not favor the argument of plaintiff, but the observation was unnecessary to the decision, and in that sense *extra judicial,* and though made by one who seldom used words without due reflection ought not to outweigh the important considerations referred to which lead to a different conclusion."

A case more directly in point than *Hans* vs. *Louisiana, supra,* could not be found nor one better suited to illustrate how far learned judges may go in uttering *obiter dictum.* In *Cohens* vs. *Virginia, supra,* where the Court was much pressed with some portions of its opinion in *Marbury* vs. *Madison,* Mr. Chief Justice Marshall does not hesitate to lay down the rule, although dealing with his own opinion. He says:

> "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question before the Court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their re-

lation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Cohens vs. *Virginia, supra,* is cited by and the above language quoted in

Carroll vs. *Carroll's Lessees,* 16 Howard, pp. 275-287.

Before closing this portion of the case for appellant, we quote the remarkable language of the late Mr. Justice Temple of the Supreme Court of California, used in *Alferitz* vs. *Borgwardt, supra:*

"Laws are not made by judicial decisions. The Court simply determines the rights of the parties to the action in that particluar controversy. It is no part of its purpose even to declare the law. It simply applies to the controversy the law as it exists when the alleged rights or liabilities accrued. The decision has never been thought to have the force and effect of law except in that special controversy. In other suits, it is authority more or less persuasive according to the reasonableness of the rule. Courts have never thought themselves bound by it as they are by a valid statute. And if it is manifestly wrong the community does not act upon it. A lawyer who would have advised a client to rely upon the Berson case in making a loan would show his incapacity.

"No doubt an appellate court assumes a very grave responsibility when it reverses a former decision which has become a rule of property, or the

law of contracts, and, whenever this is done, it must be understood that the Court has not only considered the objections to the former decision, but the evils which may follow from its reversal."

We also suggest that Mr. Justice Brewer's concurrence *in the result* is not a concurrence in those portions of the Chin Yow decision that do not effect the exact point in issue in that case.

If our position on this particular portion of the case at bar is correct, we desire to earnestly impress upon the Court that it would be no more than justice for it to consider the testimony of the witnesses taken at their examination before the bureau, and if convinced by it that this appellant is in fact a citizen of the United States, to view the rest of the case in the light that a citizen, and not a fraud is suppliant before it. We also urge that in the event of this Court's reaching the conclusion that a fair hearing in good faith had been denied by the immigration officers, and is convinced that a citizen has been wronged thereby, it order this prisoner discharged from custody forthwith.

Leaving the position taken above, we submit to the Court that the testimony of the seven witnesses offered by appellant to prove that he was a citizen of the United States was relevant in any event, as a circumstance of his case to be considered with the other testimony on the issue of the unfairness of the hearing before the bureau. It cannot be denied that it would have been of inestimable value in that regard, for had

the District Court been convinced of its truth, the element of *fraud* on the part of the applicant, would have been eliminated. That being so, the other part of his case would have been proved with much more ease by reason of the fact that the Court would much more readily receive the proof.

ARGUMENT ON THE LACK OF GOOD FAITH AND THE UNFAIRNESS OF THE HEARING BEFORE THE OFFICERS OF THE DEPARTMENT OF COMMERCE AND LABOR.

We approach this point, which is covered by the first and third errors in the Assignment of Errors (Trans. of Rec., pp. 98-99), with confidence, believing that this Honorable Court will not refuse to bring out of the chaos into which it has been plunged by prejudiced and irresponsible subordinate officers, the administration of the laws regulating Chinese immigration and exclusion.

A most casual scrutiny of the record of the proceedings before the Chinese Bureau will show that the case of Wong See Ying was lost before it was presented. His was one of those cases arbitrarily classified as "raw native" cases, a classification not authorized by law, and one that practically settles the cases of certain Chinese persons applying for admission to these United States before they have been seen or heard. A "raw native" may in fact be a citizen and he may have a multitude of witnesses to prove his citizenship, but if by force of circumstances over which he has no control he should be so unfortunate as to come within the scope of the

"raw native" class, as arbitrarily invented by the Commissioner of Immigration, his witnesses count for naught and his citizenship must be lost under a cloak of prejudice that smothers justice and denies a man the right to set foot upon the soil of his native country. He is a "raw native" and as such his standing is settled, whether he be a citizen or not.

A "raw native," according to the Commissioner of Immigration, is one who claims to have been born in this country, leaving it at an early age, but seeking to return for the first time. (Testimony of Comr. North, Tr. of Rec., pp. 28-29-30; also letter of Chinese Inspector, Tr. of Rec., p. 80, and Judgt. of Comr. North, Tr. of Rec., p. 92.)

Let us examine into and learn, if we may, what is meant by a "raw" native case.

The Commissioner of Immigration at the Port of San Francisco originated that term. It is slang and as such should have no place in the official vocabulary of a man who occupies so high a position in the government of this republic, and upon whose judgment other men are imprisoned for long periods of time or exiled forever from their native land. The gentleman is not to be congratulated upon his selection of the term nor on the spirit that prompted him to bring into a solemn proceeding, the jargon of the street.

But, be that as it may, he invented or originated it and it has taken its place in the vernacular of the Chinese Bureau. It appears twice in the record, once

in the report and recommendation of the Chinese Inspector who examined this particular case (Tr. of Rec., p. 80), and once in the letter of the Commissioner of Immigration which was the final judgment against the applicant (Tr. of Rec., p. 92). In both instances it is quoted as slang and therefore we consider it in its meaning in contemporary slang and not in its legitimate sense.

The Commissioner gives his definition of the term and displays some pride in his originality (Tr. of Rec., p. 28). By reading his testimony on that page and the following page it will be seen that that kind of cases are not popular with the Immigration officers of the United States. In the contemporary slang of the day the word "raw" is significant, and its meanings, though varied, are well defined.

In its legitimate sense it means:

> "1. Not altered from its original state; not roasted, boiled or cooked; not subdued by heat; as raw meat.
>
> "2. Not covered with the skin; bare; as flesh; as a raw spot.
>
> "3. Unseasoned; inexperienced; unripe in skill; as raw recruits of the army or navy.
>
> "4. Bleak; chilly; cold, or rather cold and damp; as a raw day; a raw, cold climate.
>
> "5. Not spun or twisted; unmanufactured; as raw silk or cotton; raw material of any kind.
>
> "6. In ceramics, unbaked."

In its slang sense it means:

"7. Unjustifiable; cheeky; impertinent; as a raw act. (Slang.)"

Webster's Universal Dictionary, 1905-6.

The above definitions (1 to 7, inclusive) are taken *in haec verba* from the authority above cited, but we claim that in slang "raw" has a great many other meanings the lexicographers have not set down. For instance, it means *risque;* as a raw story is one that may not be told in refined company. It's meaning also denotes fraud; as one may make a "raw" business proposition. It means more than mere fraud; it means palpable and apparent fraud, as a "raw" deal, or a race that was "raw." It is sometimes ironically used, as one may speak of a "raw" Irishman or a "raw" Missourian.

If it was used in the last sense in this case, then indeed "is the laugh" on Wong See Ying. Not that he laughs, for the merriment under the circumstances is probably confined to those droll spirits of the Chinese Bureau.

The slang meaning of the word "raw" always bears with it opprobrium—it is never used in gentleness or kindness—and as the Commissioner was the originator of the term as applied in cases of this character; and as its accepted meaning in good English can not be tortured into sense in its application here, and as he and his subordinates quote the word as slang, he must stand by its slang meaning.

The meaning of language familiar to all classes may not be wrested from its established import and the popular or received import of words furnishes the general rule for its interpretation.

> *Maillard* vs. *Lawrence,* 16 How., 251-261;
> *Greenleaf* vs. *Goodrich,* 101 U. S., 284.

Does the Commissioner mean that this "raw native" was not altered from his original state, or that he was not roasted, boiled or cooked, or not subdued by heat? Does he mean that he was not covered by skin, or was bare, or unseasoned, or unripe in skill, or bleak or chilly or cold, or not spun or twisted, or that he was unmanufactured or unbaked?

Obviously he means none of these things.

If he had meant the word to be used in any of its accepted meanings, he would not have quoted it. That he intended it to be understood in its slang sense is apparent from his own language.

> "As to this case, the applicant is what we call a 'raw native,' that is, he claims to be 28 years of age; to have been born in the notorious Spanish Building, this City, in 1879, and at the age of one year, or in 1880, to have departed for China with his mother, where he has since resided. This departure, of course, is before the beginning of our records. He picks out for a father a Chinese laborer who left this port for home about a year since; he offers in his own behalf the testimony of three Chinese witnesses. It is of the ordinary char-

acter in applications of this sort. By going over our files, hundreds, and probably even thousands, of records may be found wherein the testimony would not vary in any material particular, and thousands of like raw natives have claimed the Spanish Building as a birth place.

"The evidence is wholly unconvincing, and I believe that I am neither arbitrary nor unfair in rejecting it entirely. Personally, I feel that the evidence does not prove in any respect that this applicant was ever here before, much less that he is a native." (Tr. of Rec., p. 92.)

Having determined the meaning of the word raw—both as to its legitimate English value and as to its significance in contemporary slang—let us see what the word slang means.

"Slang. (Origin obscure; prob. allied to *sling* in such phrases as to sling epithets, sling reproaches, etc., and in same sense to Norw. *sleng,* a slinging device, from *slengia,* to sling.

"1. Colloquial words or phrases having hardly the stamp of general approval, and often regarded as inelegant incorrect, or even vulgar. Slang may consist either of unmeaning jargon, to which restricted specific meanings have been given, or of expressions apparently legitimate, but used in an arbitrary, capricious or grotesquely metaphorical sense.

"2. Originally thieves' jargon; the cant expression used by vagabonds, beggars and theives.

"Slang *v. i. and v. t.;* slanged, *pt.; pp.;* slanging, *ppr.*

I. *v. i.* To use slang; to make use of vulgar or abusive language.

II. *v. t.* To address in vulgar, abusive language; to abuse with slang."

Webster's Universal Dictionary, 1905-6.

Is it not evident that Wong See Ying, the appellant, was "slanged" (*supra,* Slang *v. i.* and *v. t.*) by the officers of the United States whose duty to him and to mankind, and to their country, was to treat him fairly?

Thus we see that he went into his examination a "raw native" or an unjustifiable, cheeky, impertinent "native." In other words he was an applicant for admission to the United States whose claims were unjustifiable, cheeky or impertinent. This arbitrary and unlawful presumption of guilt followed him through every step of the proceedings from his first interview with the Inspector of Immigration, on board the steamer, to the final letter of the Commissioner-General of Immigration at Washington, which shows the confirmed prejudice usual in cases of this kind without the bad taste of using slang. The presumption of innocence to which murderers, gas-pipe thugs and ravishers are entitled was not only denied this young man, but it was replaced by a presumption of fraud and guilt so dark that it could not be pierced by the light of truth.

We now proceed to discuss with as much brevity as the importance of the matter will permit, the other phases of this case.

A point now regarded by us as being of the gravest importance, was at first overlooked, and indeed it might easily be passed over without being noticed unless attention were directed to it. It is to the long experience of the members of this Court, on the bench and at the bar, that we now appeal. We quote from the examination of Wong See Ying, the applicant, by the Inspector of Immigration (Tr. of Rec., p. 73). Beside the Inspector and the applicant there were present an interpreter and a stenographer (Tr. of Rec., p. 70).

"Q. Do you remember testifying before me on the steamer?

"A. I could not remember.

"Q. Is that your signature? (Showing signature of applicant on statement made on October 16th, 1907.)

"A. Yes, that is my signature.

"Q. You did testify before me on the steamer?

"A. I was afraid to lift up my head and look at you, and if I did perhaps I could recognize you.

"Q. Why were you afraid to lift your head up?

"A. I was examined but a few words when I went in and bowed my head, and I didn't lift my head.

"Q. Why were you afraid?

"A. I made a mistake by saying I was afraid.

"Q. Then nobody has frightened you?
"A. No, I was not afraid. I made a mistake."

Is it not evident from this remarkable dialogue that some part of the testimony has been omitted from the record, or that the witness was under duress and intimidated, or influenced by fear of physical violence. By no other theory can this unaccounted breakdown of the witness be explained.

He first states, calmly, that he was afraid of the inspector; then he reiterates the statement *twice* in detail, when suddenly without apparent reason he retracts it. This breakdown bears all the marks of panic. Exactly what occurred we do not know, so we can make no specific charge—but it is apparent to us that either duress was used with this witness or that some of his testimony was suppressed.

In our experience we have never observed such an occurrence in a court room. We have seen witnesses change their front, but only when brought face to face with conflicting statements or when worn out and exposed by pitiless cross-examination. We will submit this matter to the Court without further argument, but with the suggestion that if the applicant, while a witness in his own behalf, was intimidated, or if a portion of his testimony was suppressed, and not reported to the superior officers of the Department of Commerce and Labor, then fairness and good faith were entirely lacking in his case and had no part in its hearing or determination.

The Inspector before whom appellant's case was heard wrote three letters—the first of which must be regarded as an integral part of the judgment in this case, while the other two may be regarded as supplementary to and explanatory of the first. (Tr. of Rec., pp. 77-78-79-80-81; Tr. of Rec., pp. 85-86-87; Tr. of Rec., pp. 88-89-90-91.)

It is with the first of these letters that we have to deal. It is altogether a most novel letter and as it must be thoroughly understood before a just solution of this case can be reached, we will deal with it shortly. The writer begins his letter by stating that the applicant and *two* witnesses testified. As a matter of fact there were three witnesses. He digests the testimony of these witnesses, but forgets the personality of one of them entirely. We make no point on that, however, as we believe that in this "raw native" case, where everything and everybody were presumed to be frauds, the number of witnesses or the value of their testimony could make no difference in what the preconceived judgment would be.

The letter makes one misstatement of fact, brands the applicant as a "raw native," makes a great deal of a slight discrepancy in the testimony and closes with its recommendation of denial.

As to the misstatement of fact, the letter says "that he" (the applicant) "can assign no particular reason for his not coming to this country until he was 28 years old." This misstatement was probably due to

the bad memory of the Inspector, for on page 72 in the Transcript of Record, in answer to the Inspector's own question, he says that his reason for not coming sooner was that his father *did not want him to.* Even with our western customs that seems a very good and sufficient reason, but according to the Chinese custom it is better still, for there a boy is not of legal age until he has married.

The discrepancy in the testimony, had it not been given particular stress by the officers, we would not notice. The young man said that his father was a tailor making new clothes. Obviously this was hearsay. The witnesses say the father was a launderer of new clothes. There can be no question but that the witnesses were right and the young man was wrong. The Inspector takes this view, for he says that the young man "was mixed." We think also that he was "mixed," and we state that no court or jury would consider and no trained lawyer would urge this discrepancy as discrediting the testimony of a witness unless there were other reasons as well. The letter closes with a recommendation that the applicant be denied admission and contains some remarkable language, which we quote:

> "As he is 28 years of age and was engaged in manual labor in his own country until he decided to come here, this is an addition fact in his disfavor."

Since when, pray, has the law of the United States discriminated between citizens "engaged in manual labor" and capitalists or any other class of citizens?

This applicant applied for admission as a citizen, and not as one of a privileged class of aliens, and we can not see why the fact that he was a laborer should be an "additional" or any fact in his disfavor. Its use as such was a direct violation of the law and was probably thrown into the case to lend some degree of plausibility to a judgment conceived and rendered in prejudice. It only shows that the bureau officials feel that they can not be reached by the judicial arm of the government, and its use by them, without reprimand from their superiors, ought to be sufficient ground for the reversal of this case.

The other two letters of the Inspector above referred to have no particular bearing on the case in this Court. One is in relation to certain records in the Chinese Bureau, and the other considers the testimony of the witness who had been forgotten.

The letter of the Commissioner, which clinches the judgment against appellant, shows very slight consideration of the case. He says that it is a "raw native" case, which seems to be enough for the purpose. The reprimand to the Inspector only touches upon his having forgotten one witness. It is remarkable that the reprimand does not extend to the fact that in a case where it was not an issue, the fact that the applicant

was a laborer was used against him (Tr. of Rec., pp. 91-92; see also extract quoted herein, *supra*).

This case ends with the letter of the Commissioner-General of Immigration—a record of dogma, dictum, prejudice and misstatement. The first misstatement is small enough in itself, but is nevertheless a misstatement and shows that the Commissioner-General did not go into the testimony very deeply.

He says that applicant is coming to his cousin. There is nothing of the kind in the record, and as a matter of fact it is not so. The second misstatement of fact is somewhat graver, for on it some of the dogma of the opinion is grounded. He says, in speaking of this cousin, Wong Hong Ping: "It is hardly possible " that a boy 10 or 11 years old would have come to this " country without his family," etc.

The testimony shows that the boy was an orphan and that he came to this country with his uncle, the father of this appellant (Tr. of Rec., p. 56 and p. 57).

The statement that the records of his office show that Wong Hong Ping swore that he first arrived in this country in July, 1880, or only about three months prior to the time appellant was taken to China, deserves some attention. The Commissioner-General, in using evidence so damaging to a claimant to citizenship, should have set forth the record in full—that it might be seen by all. As it is not in the record in this case and was used for the first time upon the appeal, we do not feel that it should receive attention by us.

The explanation of this apparent hiatus, however, is simple. The Chinese calendar and the Gregorian calendar are so different that Chinese never accurately interchange a date from their system of recording time into ours. It is the same when we attempt to fix a date in the calendar of Kwang Sue, although, in our own calendar, it is familiar to us. Had the witness been confronted with this record, who can doubt but that he could have explained it in a satisfactory manner? His testimony throughout its whole extent carries with it the conviction that the truth is being told. Neither the Inspector nor the Commissioner regarded this discrepancy in time as of enough consequence to mention in their letters; but had they done so it could have been scrutinized, challenged or explained by the attorneys for the applicant at the time, even had it been necessary to have a further hearing.

> "Where a witness is inexperienced * * * inaccuracy in stating distance and computation of time do not justify discrediting his testimony, otherwise reliable."
>
> *The Carroll,* 8 Wal., p. 304.

This is our case.

We feel that we have demonstrated that a fair hearing in good faith has been arbitrarily denied this appellant by the officers of the government. We think that the record teems with evidence of it. A man who

applied for admission as a citizen was unlawfully classified, was slanged, was bullied and treated with contempt. A part of his testimony was suppressed, the fact that he was a laborer was used against him without warrant or authority of law. The testimony of his witnesses was misunderstood, garbled, misstated and stretched beyond its meaning in an effort to make it fail in its purpose, and he was prejudged and presumed to be a fraud through every step of his proceedings.

We might have argued at greater length and gone more deeply into detail, but we think that enough has been said. The testimony of the appellant and his witnesses before the bureau proved him, beyond the question of a doubt, to be what he claims to be, a citizen of the United States. We would have sworn more witnesses on that point in the District Court had we been permitted, but their testimony would have been but cumulative. What more could it be in a case already proved? We urge that if this Court find for us on the first point, that it consider the whole of the testimony as it appears in the record, and do the justice that the recalcitrant administrative officers have failed and refused to do.

It is respectfully submitted that for various reasons urged in this brief, the judgment and order of the District Court discharging the writ of *habeas corpus* and remanding the appellant to the custody from whence

he was taken be reversed, and that this Honorable Court make its order discharging him from custody and restraint forthwith.

Respectfully submitted.

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